IN THE

Supreme Court of the United States

OCTOBER TERM 1948

No. 559

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FILED
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CHARLES ELMORE
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AMERICAN FIDELITY & CASUALTY CO., INCORPORATED and A. CIMPI EXPRESS LINES, INC.,

Plaintiffs-Respondents,

—against—

NEW AMSTERDAM CASUALTY COMPANY,

Defendant-Petitioner.

JOSEPH CARNICELLI, SEYMOUR WOLFSON by SADIE WOLFSON, as Guardian ad Litem, SADIE WOLFSON, GLORIA WOLFSON by SADIE WOLFSON, as Guardian ad Litem, SAMUEL GREEN, JUNICE GREEN, by SAMUEL GREEN, her Guardian ad Litem, MONROE W. GULLBERG, as Administrator of the Goods, Chattels and Credits of ELEANOR GULLBERG, deceased, EDWIN L. WOLF, as Administrator of the Goods, Chattels and Credits of RICHARD FRED WOLF, deceased, WILLIS H. GOLDSMITH, as Administrator of the Goods, Chattels and Credits of BETTY MARIE GOLDSMITH, deceased, CLYDE E. BUTLER, as Administrator of HARRY EDWIN BUTLER, deceased, WILLIAM HERBERT, EARL SHOEMAKER, JOSIAH BETHARDS, GEORGE F. LOKER, as Guardian ad Litem of BEATRICE CAROLINE LOKER, GEORGE F. LOKER, JEAN ELIZABETH MATTHEWS, an infant by ETTA H. MATTHEWS, her Guardian ad Litem, and ETTA H. MATTHEWS, BEATRICE KANDEL, an infant by JUDAH KANDEL, her Guardian ad Litem and JUDITH KANDEL, MARY LOU JORGENSON, an infant by FREDERICK E. JORGENSEN, ESTATE OF DOUGLAS P. WINTERBOURNE, deceased, ESTATE OF JEANNE COSGROVE, deceased, and the following infants, JAMES PRENTICE, RICHARD PHLEGING, ALBERT HANSEN, MADELINE DEPUY, SHIRLEY WISEMAN, RICHARD DONNELLY, MARY JOHNSON, GEORGE McPHILLIPS, LEE HASSAN, AUDREY STILLER, WILLIAM MARSHALL and RICHARD HANSEN,

Defendants.

MONROE W. GULLBERG, as Administrator of the Goods, Chattels and Credits which were of Eleanor Gullberg, deceased,

Plaintiff-Respondent,

—against—

NEW AMSTERDAM CASUALTY COMPANY,

Defendant-Petitioner.

BRIEF OF RESPONDENT A. CIMPI EXPRESS LINES, INC., IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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No Cases Cited

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BRIEF OF RESPONDENT A. CIMPI EXPRESS LINES, INC., IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

Opinions Below

Most of the opinions below are given both on Page 2 of Petitioner's brief and also on Page 2 of Respondent Gullberg's brief and therefore are here referred to and not repeated.

Statement

At the time of this unfortunate accident, out of which these cases arose, A. Cimpi Express Lines, Inc. had in existence two insurance policies. One was with the American Fidelity & Casualty Co., Incorporated with limits of $10,000 to $20,000; the other with New Amsterdam Casualty Company with limits of $50,000 to $100,000. Each of these policies had each been filed with the Public Service Commission of the State of New York as a required policy, and each policy predated the accident.

The New Amsterdam policy was issued October 26th, 1941 and on May 12th, 1942 was extended to cover A. Cimpi Express Lines, Inc., and same was in full force and effect on September 25th, 1942 (the day of accident) the expiration date being October 26th, 1942.

The answer to the complaint was verified by John P. Kenneally, Asst. Sec'y, July 6th, 1943 (fol. 67) and the amended answer verified by the same officer on behalf of New Amsterdam Casualty Company on July 26th, 1943 (fol. 86) and a further amended answer served thereafter.

The New Amsterdam Casualty Company disclaimed while the American Fidelity & Casualty Co., Incorporated defended the actions and also brought an action for a declaratory judgment in which it claimed, in substance, that the policy of the New Amsterdam Casualty Company was not only in full force and effect but also the primary policy and the policy of American Fidelity & Casualty Co.,

Incorporated, was excess. In the meantime, the recoverers by the injured parties and representatives of those who lost their lives exceeded the total limits of both policies and the action of American Fidelity & Casualty Co., Incorporated became academic and the Court permitted a discontinuance of that action but A. Cimpi Express Lines, Inc. continued the action against the New Amsterdam Casualty Company.

Argument

In its petition, Petitioner states on Page 7 that the question presented is "Can the State of New York require of an interstate carrier engaged in an interstate operation, liability insurance in addition to that required by the Interstate Commerce Commission as a prerequisite to the issuance of its certificate to the interstate carrier?".

Significantly, as the record shows, when the New Amsterdam Casualty Company sought to avoid its obligation by disclaiming that was not the point raised at all. The point of disclaimer was upon the ground that the policy did not apply because the tractor used in towing the trailer was not owned by the same party who owned the trailer and that the insurance did not cover both vehicles (fols. 1046-1047). This disclaimer was on February 5th, 1943, at which time the policy was in full force and had an indorsement under 3B of the Public Service Law and on a form known as Company Form No. 6, and no cancellation notice was ever sent to anybody involved (fols. 1030-1032). It is, therefore, apparent that when Petitioner realized the extent of damage and that it might be called upon to pay its limits, it began to seek grounds for avoiding payment even though no such grounds were advanced in the disclaimer.

The statement that the Public Service Commission might require policies in amounts in excess of those now required, as minimum, is without foundation. The minimum amounts

are recited in Petitioner's brief and in no instance do they exceed the amounts required by the Interstate Commerce Commission, and no maximum is named or required. The Public Service Commission could not compel these parties to file for any greater amount. It simply accepted the agreement between the parties as expressed in the policies. There was no attempt on the part of the Public Service Commission to ask for limits higher than the minimum nor was there any attempt to interfere between assured and the insurer's contract.

The only other argument was that the vehicle was engaged in Interstate Commerce. This should hardly be considered. While it is the fact that vehicles commencing and ending an operation within the same State but over a route which takes the vehicles through another state are engaged in Interstate Commerce, the fact remains that that must be the recognized route. It does not apply to a single exception. It only applies to the rule. In this case the carrier maintained its route entirely within the State of New York. On this day it is claimed there was a deviation. By the time the accident occurred the driver had come upon his original route and was proceeding and had been proceeding for several miles within the State of New York. It is not shown or claimed that the route of this carrier was normally anything but Intrastate.

CONCLUSION

It is respectfully urged that the petition be denied.

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